No. 93-714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

U.S. BANCORP MORTGAGE COMPANY,

Petitioner,

vs.

BONNER MALL PARTNERSHIP,

Respondent.

BRIEF OF AMICUS CURIAE THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - Continued

Statutes:

TABLE OF AUTHORITIES - Continued

Other Authorities:

TABLE OF AUTHORITIES - Continued

BRIEF OF AMICUS CURIAE THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This Brief, in support of the Petition for a Writ of Certiorari, is submitted in accordance with Rule 37 of the Rules of this Court and pursuant to the attached written consent of all parties.

INTEREST OF AMICUS CURIAE

Amicus, the American Council of Life Insurance ("ACLI"), is the principal national trade association of life insurers. ACLI's 634 member companies account for 90% of the legal reserve life insurance in this country and are among the nation's largest and most significant commercial lenders. In 1992, life companies' net investment in U.S. capital markets totaled $107.3 billion — ranking second (only after mutual funds) among private domestic capital sources.[1]

The interest of the ACLI as *amicus* arises out of the signal importance the decision below has to the commercial lending community. As a principal source of investment capital in the United States, life insurance companies have a broad and important perspective on the reasons why Supreme Court review is needed here.

The question of existence and content of a new value exception to the absolute priority rule in bankruptcy is one of the most important issues of bankruptcy law today. The absolute priority rule lies at the heart of corporate law and bankruptcy

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[1] American Council of Life Insurance, *1993 Fact Book Update* 46-54 (1993); *see also* American Council of Life Insurance, *Life Insurance Fact Book* 84-103 (1992).

reorganization.[2] It sets forth the fundamental ordering of rights and priorities between equity owners and creditors and "sets the ground rules of Chapter 11."[3]

The absolute priority rule was expressly codified, *without exception*, in Section 1129(b)(2)(B)(ii) of the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code"), 11 U.S.C. § 101 *et seq.* This rule is part of the Code's requirement that a reorganization plan be "fair and equitable" in order to be confirmed over objection of a creditor class. 11 U.S.C. § 1129(b)(1). The absolute priority rule provides that the debtor must pay a nonconsenting class of unsecured creditors in full or "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B).

The decision below deals a dramatic blow to the rule of absolute priority. It not only (a) upholds the existence of a "new value" exception by which old equity, despite objection by an impaired creditor class, may purchase ownership of the reorganized debtor, but (b) more sweepingly holds that old equity can be granted an *exclusive* right to purchase that ownership on terms it sets without competitive bid or counter-proposal.

Life insurance companies, like all lenders, presently are faced with conflicting rules as to the existence and application of a new value exception to the absolute priority rule. The bankruptcy courts, district courts and courts of appeal are divided, as is the abundant scholarship on the subject. The present legal morass consists, at least in part, of different judicial responses to the Court's statements in *Norwest Bank Worthington v. Ahlers*, 485

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[2] *See* Elizabeth Warren, *A Theory of Absolute Priority*, 1991 Ann. Surv. Am. L. 9 (1992).

[3] Douglas G. Baird, *The Elements of Bankruptcy* 73 (1992).

U.S. 197 (1988).[4] Lenders are thus faced with significant uncertainty.

Lenders price loans and bargain for security and other terms based on risks of nonpayment and potential for recovery in the event of default. Lenders (and borrowers) need a uniform national rule of bankruptcy distribution priorities and a rule capable of consistent application. Particularly in these difficult economic times, uncertainty as to the fundamental compact between debt holders and equity — *i.e.*, an understanding as to rights and priorities in the event of insolvency — serves to make loan money and other credit less available. Such uncertainty also serves to make difficult or impossible consensual workouts, which can obviate the need for bankruptcy or any judicial intervention. Review of the decision below is thus vitally important to the ACLI and its members.

SUMMARY OF ARGUMENT

The statutory absolute priority rule, and the existence and terms of an extra-statutory exception, is a recurring matter badly in need of the Supreme Court's authoritative voice. Review is necessary because of: (i) the fundamental significance of the absolute priority rule; (ii) the conflict in decisions of the courts of appeal and among many lower courts as well as the perceived conflict between two recent decisions of this Court; (iii) the need for a uniform national rule; (iv) the need for a workable rule capable of consistent application; and (v) the need for the Court

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[4] In *Ahlers* the Court expressly declined to reach the question of whether a new value exception exists, although urged to do so by the United States as *amicus curiae*. *Ahlers*, 485 U.S. at 203 n.3. The Court recognized, however, that the vitality of the exception is "a question which has divided the lower courts since passage of the Code in 1978." *Id.* Since *Ahlers*, the debate over new value and absolute priority has continued, without consensus (except as to need for Supreme Court review).

to provide a consistent approach to construction of the Bankruptcy Code.

REASONS FOR GRANTING THE WRIT

THE NEW VALUE EXCEPTION IS AN IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW. THERE IS A CONFLICT IN DECISIONS OF COURTS OF APPEAL AND AMONG MANY LOWER COURTS AS TO ITS EXISTENCE AND CONTENT. THERE IS A PERCEIVED CONFLICT BETWEEN DECISIONS OF THIS COURT AS TO THE APPROPRIATE APPROACH TOWARD CONSTRUCTION OF THE BANKRUPTCY CODE, PARTICULARLY WITH REGARD TO PRE-CODE PRACTICE. EXISTENCE OF A NEW VALUE EXCEPTION IS CONTRARY TO THE EXPRESS LANGUAGE OF THE BANKRUPTCY CODE. THE EXCEPTION ARTICULATED BY THE NINTH CIRCUIT IS UNWORKABLE AND INCAPABLE OF CONSISTENT APPLICATION, ESPECIALLY IN SINGLE ASSET REAL ESTATE CASES LIKE THE INSTANT CASE.

ACLI's Statement of Interest sets forth the singular importance of the matter at hand and the need for a uniform national rule as to absolute priority. This Court should provide such a rule.

A. There Is A Need For Supreme Court Review To Resolve Conflicts Among Decisions By Courts Of Appeal And Lower Courts As Well As A Widely Perceived Conflict Between Decisions Of This Court.

The conflict in decisions between and within the courts of appeal, as well as the widespread conflict among lower courts, is described at pages 13-16 of the Petition for Writ of Certiorari.[5] Of equal importance is the perceived conflict between two recent decisions by this Court as to the appropriate approach toward construction of the Bankruptcy Code and, in particular, the impact of pre-Code practice. Those decisions are *Dewsnup v. Timm*, 502 U.S. ____, 112 S. Ct. 773 (1992), and *United States v. Ron Pair Enters., Inc.*, 489 U.S. 240 (1989).

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[5] The decision below squarely conflicts with the Fourth Circuit's decision in *In re Bryson Properties, XVIII*, 961 F.2d 496 (4th Cir.), *cert. denied*, 113 S. Ct. 191 (1992). While the Fourth Circuit in *Bryson* did not rule on the existence *vel non* of a new value exception, it did hold that a reorganization plan that gives old equity alone the right to retain an interest in the reorganized debtor violates 11 U.S.C. § 1129(b)(2)(B)(ii). *Id.* at 504-05. In the decision below, the Ninth Circuit expressly rejected *Bryson* and held that such new value plans are confirmable. *In re Bonner Mall Partnership*, 2 F.3d 899, 910 (9th Cir. 1993).

Moreover, statements from the Seventh Circuit show internal division in that Circuit. In *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1361 (7th Cir. 1990), the court stated that "[t]he language of the Code strongly suggests" that the new value exception is not viable. In a more recent decision, *In re Snyder*, 967 F.2d 1126, 1129 (7th Cir. 1992), a different Seventh Circuit panel advised that there are strong reasons to believe the new value exception is viable. In *In re Greystone III Joint Venture*, 995 F.2d 1274 (5th Cir. 1991), the Fifth Circuit first found that new value was not a viable exception to the absolute priority rule; however, on rehearing the court reversed itself and vacated its earlier opinion as it applies to the new value exception. It now expresses "no view whatever" on the new value exception. *Id.* at 1284.

footnote continued on page 7

Dewsnup held, in the context of a Chapter 7 case, that Section 506(d) of the Code does not allow a debtor to strip down a mortgage when the property is abandoned. In *Dewsnup*, the Court stressed the primacy of pre-Code practice in construing the Code, noting that "[w]hen Congress amends the bankruptcy laws, it does not write on a clean slate." *Dewsnup*, 112 S. Ct. at 779 (citation and internal quotation marks omitted). *Dewsnup* advises lower courts to incorporate pre-Code bankruptcy concepts unless "convinced that Congress intended to depart from the pre-Code rule." *Id.* at 778. The decision below relied heavily on *Dewsnup*. 2 F.3d at 912-13.[6]

Ron Pair, by contrast, stressed natural interpretation of statutory language. Based on the statutory text, *Ron Pair* held that Section 506(b) of the Bankruptcy Code requires that post-petition interest be allowed on nonconsensual oversecured prepetition claims. The Court directed that "the plain meaning of legislation should be conclusive, except in the rare cases [in

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footnote continued from page 6

Added to the confusion is disagreement as to the terms of the exception, if it exists. For example, some cases, like the decision of the Ninth Circuit below, hold that old equity's right to purchase ownership can be exclusive and need not be subjected to competitive bidding; other cases hold that the exception requires that an auction be held. *See, e.g., In re Bjolmes Realty Trust*, 134 B.R. 1000, 1010 (Bankr. D. Mass. 1991).

Numerous recent lower court cases rejecting and adopting the new value exception are catalogued in *In re SM 104 Ltd.*, No. 92-22698-BKC-AJC, 1993 Bankr. LEXIS 1352, at *66-68 & nn. 40-41 (Bankr. S.D. Fla. Sept. 15, 1993).

[6] Other lower courts similarly have relied on *Dewsnup* as a basis to import a new value exception into Chapter 11. *See, e.g., Snyder*, 967 F.2d at 1129; *In re One Times Square Assocs. Ltd. Partnership*, No. 92 B 41471, 1993 Bankr. LEXIS 1553, at *34-35 (Bankr. S.D.N.Y. Oct. 15, 1993); *In re S.A.B.T.C. Townhouse Ass'n, Inc.*, 152 B.R. 1005, 1009 (Bankr. M.D. Fla. 1993).

which] the literal application of a statute produces a result demonstrably at odds with the intentions of its drafters." *Ron Pair*, 489 U.S. at 243 (citation and internal quotation marks omitted); *accord Toibb v. Radloff*, 111 S. Ct. 2197, 2199-2200 (1991).

This Court should establish a consistent approach to construction of Chapter 11 of the Bankruptcy Code.

1. Under *Ron Pair*, The Code's Clear Statutory Language Should Control.

Whether or not a new value exception exists, and what the terms of such exception might be, are matters of statutory interpretation. Here the statute is the Bankruptcy Code. Under Section 1129(b)(1) of the Code, a plan can be confirmed over opposition of an impaired class, *i.e.*, by cramdown, only if it is "fair and equitable" with respect to that class.[7] Under Section 1129(b)(2)(B), a plan must observe the absolute priority "requirement" in order to be "fair and equitable":

> (2) For the purpose of this subsection, the condition that a plan be *fair and equitable* with respect to a class *includes the following requirements*:

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[7] Section 1129(b)(1) provides:

> (b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1).

* * *

(B) With respect to a class of unsecured claims —

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

11 U.S.C. § 1129(b)(2)(B) (emphasis added).[8]

The statute is clear. The condition that a plan be fair and equitable "includes" as a "requirement[ ]" the rule of absolute priority, *i.e.*, the unsecured class must be paid in full or junior classes receive nothing. 11 U.S.C. § 1129(b)(2)(B).

On its face, the Bankruptcy Code describes absolute priority as a *minimum* requirement for cramdown plan confirmation. The word *includes*, which precedes the listing of confirmation requirements, means that the courts can impose more

[8] The debtor may pay creditors over time as long as the present value of the time payment at least equals the allowed amount of the claim. The property received by the creditors may be tangible or intangible, including securities of the debtor or a successor to the debtor under a plan of reorganization. 3 David G. Epstein *et al.*, *Bankruptcy* § 10-21 (1992).

requirements, not provide exceptions that eviscerate the minimum.[9]

The Ninth Circuit, specially relying on *Dewsnup*, found that the term *includes* "leaves room" for an exception to the plainly stated rule. 2 F.3d at 912. The court imported its view of pre-Code practice, *i.e.*, the new value exception, into the Code text because "the Code does not unambiguously abrogate" it and its legislative history does not "dictate[ ] a contrary result." *Id.* at 913.

Ron Pair teaches that natural interpretation of statutory language should control Code interpretation absent compelling reason to the contrary.[10] Here there are no compelling reasons to override or eviscerate the statutory language. There is no suggestion in Section 1129, or in the Bankruptcy Code as a whole, that a new value exception exists. Moreover, nothing in

[9] *See In re A.V.B.I., Inc.*, 143 B.R. 738, 743 (Bankr. C.D. Cal. 1992) (rejecting existence of new value exception); *In re Outlook/Century Ltd.*, 127 B.R. 650, 656 (Bankr. N.D. Cal. 1991) (rejecting existence of new value exception).

[10] The Ninth Circuit also departed from the rule of natural interpretation of plain language when it held that old equity's exclusive right to purchase ownership of the reorganized debtor was not received or retained "on account of" its prior ownership interest in the debtor. 2 F.3d at 910. An exclusive right to purchase ownership constitutes property. *Bryson*, 961 F.2d at 504; *Kham and Nate's*, 908 F.2d at 1360. The only reason old equity is able to obtain this special purchase option is because of its pre-petition ownership of the debtor. *Id.*; *accord Outlook/Century*, 127 B.R. at 654; *In re Lumber Exch. Bldg. Ltd. Partnership*, 125 B.R. 1000, 1008 (Bankr. D. Minn.), *aff'd on other grounds*, 134 B.R. 354 (D. Minn. 1991), *aff'd*, 968 F.2d 647 (8th Cir. 1992).

the legislative history suggests a Congressional intention to enact a new value exception.[11]

2. Authoritative Guidance Is Needed As To The Role Of Varying Pre-Code Reorganization Practices In Chapter 11 Interpretation.

In the wake of *Dewsnup*, the lower courts have not adequately focused on the danger of holding that old case law, arising under a different statutory scheme, should control interpretation of the Bankruptcy Code. Moreover, none of the cases cited in the decision below, including *Dewsnup*, analyzes, or even adverts to, the advisability of incorporating single elements of pre-Code

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[11] In urging the Court in *Ahlers* to rule that there is no new value exception, the Solicitor General emphasized:

> *Nothing in the legislative history suggests a congressional intention to maintain the exception* discussed in *Los Angeles Lumber*. The House report, in describing proposed Section 1129(b), states: "The general principle of the subsection permits confirmation notwithstanding non-acceptance by an impaired class if that class and all below it in priority are treated according to the absolute priority rule. The dissenting class must be paid in full before any junior class may share under the plan." H.R. Rep. 95-595, *supra*, at 412. *No exceptions to this rule seem to be contemplated.*

Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (No. 86-958) (hereinafter "Solicitor General's Brief in *Ahlers*") at 21 (emphasis added) (footnotes omitted).

reorganization law into the complex matrix of checks and balances that constitute Chapter 11.[12]

Chapter 11 was enacted in 1978 as a comprehensive overhaul of federal reorganization law. The three reorganization chapters of the old Bankruptcy Act of 1898, Chapter X (large business reorganizations), Chapter XI (small business reorganizations), and Chapter XII (real estate reorganizations), were combined into a single, new Chapter 11. 5 *Collier on Bankruptcy* (Lawrence P. King ed., 15th ed. 1993) (hereinafter "*Collier on Bankruptcy*") ¶ 1100.01[2] at 1100-1108. Overall, dramatic changes were made in business reorganization cases.

Significant differences existed among each of the reorganization chapters of the old Act, as well as between reorganization practice generally under the old Act and current Chapter 11 practice. For example, in old Chapter X the debtor had no exclusive right to propose a plan.[13] Instead, all persons *other than* the debtor could submit proposals for a plan to the trustee, and the debtor could not file a plan until the trustee's time to file had expired. 5 *Collier on Bankruptcy* ¶ 1100.01[1]. In contrast, under new Chapter 11 the debtor generally has an exclusive right to file a plan for at least 120 days after the date of the bankruptcy petition and 60 additional days to obtain its acceptance. *See* 11 U.S.C. §§ 1121(b)-(c).

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[12] The Ninth Circuit cited the Court's decision in *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990), as support for a strong presumption in favor of importing pre-Code practices into the Code. 2 F.3d at 912 n.31. *Davenport*, however, relied on the Code's plain statutory language in the context of a Chapter 13 wage earner case to refuse "to carve out a broad judicial exception to discharge for [criminal] restitution orders." 495 U.S. at 563. Contrary to the Ninth Circuit's reading, the Court declined in *Davenport* to eviscerate statutory language in favor of a pre-Code practice against discharge of such obligations. *Id.*

[13] Under old Chapter XI the debtor had the exclusive right to file a plan for the duration of the case. 5 *Collier on Bankruptcy* ¶ 1100.01[1].

Under Chapter X, a trustee, with power to operate the business and investigate all pertinent matters, was generally required, while in Chapter XI the debtor generally was permitted to remain in possession of its property and to conduct its business. 5 *Collier on Bankruptcy* ¶ 1100.01[1]; *see A.V.B.I.*, 143 B.R. at 743. Under new Chapter 11, the debtor ordinarily is allowed to remain in possession. 11 U.S.C. §§ 1107-08.[14]

In short, there was no singular pre-Code reorganization practice. Moreover, the new value exception arose in response to a problem under the old Act that does not arise under the Code. The Court's dicta in *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106 (1939), out of which the discussion of new value arises, related to a "holdout" problem unique to the old Bankruptcy Act. Under the Act, a plan could be confirmed only if it was "fair and equitable" *to each dissenting creditor*. *See* Bankruptcy Act of 1898, Ch. X, § 221 (formerly codified as amended at 11 U.S.C. § 621 (1978), *repealed by* Bankruptcy Code; Solicitor General's Brief in *Ahlers* at 14 n.13 (discussing old Chapter X and its predecessor, Section 77B). Not only was class acceptance required, but the plan had to observe absolute priority as to minority dissenting creditors of the same class. *Id.*

The present Code is different. The Bankruptcy Code permits a creditor class, by a class vote that overrides the objections of minority members, to assent to a plan that is not "fair and equitable," *i.e.*, does not observe absolute priority. 11 U.S.C.

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[14] Chapter X had an absolute priority (fair and equitable) rule. However, absolute priority was deleted from Chapters XI and XII of the Act in 1952. Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69, 91-92 (1991); Stephen W. Sather & Adrian M. Overstreet, *The Single Asset Debtor: A Selective Overview*, 2 J. Bankr. L. Prac. 343-47 (1993).

§ 1129(a)(8)(A). "Holdouts that spoiled reorganizations and created much of the motive for having judges 'sell' stock to the manager-shareholders no longer are of much concern, now that § 1126(c) allows the majority of each class (two-thirds by value) to give consent." *Kham & Nate's*, 908 F.2d at 1361.[15]

To underscore the danger of importing old Act reorganization practice into the Bankruptcy Code, it is also important to note that the new value concept arose from dicta, not holding, in *Los Angeles Lumber*.[16] Despite that dicta, the Court has *never*

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[15] Indeed, as noted by the Solicitor General in *Ahlers*, a substantial majority of bondholders had voted to accept the plan in *Los Angeles Lumber* and such bondholder consent would have been sufficient under the new Code consensually to confirm the plan under § 1129(a)(8)(A). Solicitor General's Brief in *Ahlers* at 14 n.13, 18 n.16.

[16] *Los Angeles Lumber* was a case under Section 77B (predecessor to Chapter X) of the Bankruptcy Act, in which the Court rejected a reorganization plan that violated absolute priority. As to new value, the Court stated:

> [T]his Court [has] stress[ed] the necessity, at times, of seeking new money "essential to the success of the undertaking" from the old stockholders. Where that necessity exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made . . . .

308 U.S. at 121 (footnote omitted). The pre-Code new value exception as understood by the Ninth Circuit has the following five requirements:

> Former equity owners were required to offer value that was 1) new, 2) substantial, 3) money or money's worth, 4) necessary for a successful reorganization and 5) reasonably equivalent to the value or interest received.

2 F.3d at 908 (citing *Los Angeles Lumber*, 308 U.S. 121-22).

adopted the new value exception in a case holding.[17] As acknowledged in the decision below, prior to passage of the 1978 Code, the last time the new value exception was even adverted to by this Court was in 1946. 2 F.3d at 912. Commentators note that *no* reported decision adopted the *Los Angeles Lumber* dicta as holding prior to the Code's adoption in 1978. Markell, *supra*, at 92; John T. Bailey, *The "New Value Exception" in Single Asset Reorganizations: A Commentary on the Bjolmes Auction Procedure and Its Relationship to Chapter 11*, 98 Com. L.J. 50, 54 (1993). "New value" cramdowns were not established pre-Code practice.[18]

Holding pre-Code practice to be an overriding canon, warranting the incorporation of isolated pieces of pre-Code practice and dicta into the Bankruptcy Code, ultimately will result in havoc being played on the Chapter 11 statutory matrix. To the extent that *Dewsnup* is perceived to be a command to follow such canon, it should be limited by this Court.

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[17] Moreover, *Los Angeles Lumber* does not analyze the impact of an exclusivity concept (now operative in Chapter 11) on the new value dictum. Nor does it analyze the informational advantage, or potential for abuse, available to old equity when the debtor remains in possession and its owners are given the right to purchase the reorganized entity over the objection of impaired creditors.

[18] Epstein, Nickles and White observed in 1992:

> This wall, the absolute priority rule, has protected reorganization creditors quite effectively against debtors onslaught for nearly 80 years. However, in the past decade debtors have successfully breached the wall in a handful of cases under the banner of "new value."

3 Epstein, *supra*, §§ 11-25, at 134.

B. The New Value Exception Is Unworkable And Incapable Of Consistent Application, Especially In Single Asset Real Estate Cases.

At bottom, a new value exception is a judicial power to sell ownership of an insolvent entity to old equity over objection by impaired creditors, who may be receiving only a small fraction of the amounts owed them. Under the decision below, the price that old equity pays is the price it unilaterally sets, subject only to judicial upset.

The potential for abuse is enormous. Under present Chapter 11, old equity typically remains in possession. It has superior knowledge about the firm, *i.e.*, an informational advantage over the bankruptcy judge and the creditors. *See A.V.B.I.*, 143 B.R. at 743; Douglas G. Baird, *The Elements of Bankruptcy* 250 (1992). Old equity alone proposes and supports the price, the adequacy of which is not subject to the check of competitive bid.

The exception is most unworkable, and incapable of consistent application, in cases like this one, involving a debtor whose estate consists of a single commercial real estate asset.

Single asset cases comprise a substantial portion — in some districts as much as half — of all Chapter 11 filings. Lisa Hill Fenning *et al.*, *Good Faith: Roundtable Discussion*, 1 Am. Bankr. Inst. L. Rev. 11, 14-15 (1993). Typically, the asset — a mall, office building or apartment building — is fully encumbered with mortgage debt. *See In re SM 104 Ltd.*, No. 92-22698-BKC-AJC, 1993 Bankr. LEXIS 1352, at *3 (Bankr. S.D. Fla. Sept. 15, 1993). In the case at hand, for example, the lender's claim was for $6.6 million, and the collateral was valued at $3.2 million —

yielding a secured claim of $3.2 million and an unsecured deficiency claim of $3.4 million. 2 F.3d at 899.[19]

Under Section 1129(b)(2), the mortgage lien will remain intact and survive the bankruptcy, at least to the extent of the value of the collateral. Even after bankruptcy discharge of the unsecured debt, the debtor's property will remain fully encumbered. At best, the equity value is "highly speculative."[20] A rule of law that overrides creditors' fundamental statutory priority based on such speculation is not susceptible of just or consistent application.

The issue before the Court is one of the most fundamental and important issues of bankruptcy law today. It is also one of the most unsettled. Allowing the matter to continue to fester in lower courts will serve no positive purpose and will harm the operation of domestic credit markets.

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[19] By virtue of Section 506(a) of the Code, the mortgagee has an unsecured deficiency claim for the amount by which the mortgage debt exceeds the value of the collateral.

[20] "In single asset real estate cases where the property is fully encumbered, the capitalized earnings value presumably has been entirely allocated to the valuation of the secured claim, as required by § 506 and the absolute priority rule. That leaves the question of how to value the highly speculative equity." *See SM 104*, 1993 Bankr. LEXIS 1352, at *92.

CONCLUSION

For the reasons stated herein and in the Petition for a Writ of Certiorari, the American Council of Life Insurance, as *amicus*, respectfully submits that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Re: Bonner Mall Partnership v. U.S. Bancorp Mortgage Company

Dear Mr. Elsaesser:

On Friday, November 19, 1993, we spoke by telephone, and you provided your consent to the filing of a brief by The American Council of Life Insurance as amicus curiae in support of the Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit in the above-captioned matter. Pursuant to Supreme Court Rule 37, I am requesting that you sign, on the line provided below, to confirm in writing your consent to the filing of this amicus brief. After you have done so, please return this document to me.

Very truly yours,

SONNENSCHEIN NATH & ROSENTHAL

By: Lorie A. Chaiten
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November 23, 1993

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Re: U.S. Bancorp Mortgage Company v. Bonner Mall Partnership

Dear Mr. Anderson:

Please confirm, by signing below, that Petitioner U.S. Bancorp Mortgage Company consents to the filing of an amicus curiae brief by the American Council of Life Insurance in connection with the petition for writ of certiorari filed in the above-referenced case. The consent should be returned to my attention.

Very truly yours,

Robert B. Millner
Counsel for American Council
of Life Insurance

RBM/hlf/61544

CONSENT TO FILING OF AMICUS BRIEF:

By: _____
Bradford Anderson
Counsel of Record For Petitioner
U.S. Bancorp Mortgage Company